UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

800 RIVER ROAD OPERATING COMPANY, LLC d/b/a CARE ONE AT NEW MILFORD — Case 22-CA-204545

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST

RESPONDENT'S POST-HEARING BRIEF

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Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. PRELIMINARY STATEMENT

This case involves allegations that Respondent 800 River Road Operating Company, LLC d/b/a Care One at New Milford[1] (Respondent or the Center), a rehabilitation and nursing facility, violated Section 8(a)(5) of the National Labor Relations Act (the Act) in two ways: (1) by unilaterally decreasing bargaining unit employees' hours since about February 2013 without providing notice and an opportunity to bargain with Charging Party 1199 SEIU, United Healthcare Workers East (the Union) (Compl. ¶¶ 19, 20); and (2) by taking disciplinary action without providing notice to and an opportunity to bargain with the Union in violation of the Board's decision in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. (2016) (Compl. ¶¶ 21-25).[2]

CGC's first allegation—that Respondent unilaterally decreased bargaining unit employees' hours—is based solely on a chart created by the Union of 20 bargaining unit employees whose hours were allegedly reduced (the Chart). Furthermore, the information in the Chart is supported only by a limited number of payroll registers CGC entered into evidence from approximately five (5) or six (6) pay periods before and after these employees' hours were allegedly reduced.[3] CGC

[1] Care One at New Milford was previously named Woodcrest Health Care Center, and references to Woodcrest and Care One at New Milford both refer to the Center. (Tr. 22).

[2] These are the only two remaining allegations in this case. The allegations in Paragraphs 18 and 26 were settled on the day of the hearing, and the allegations in Paragraphs 27 through 29 were withdrawn via amendment to the Complaint. (GC Exh. 2(j)-(l), 3).

[3] In its opening statement at the hearing, counsel for the General Counsel (CGC) focused solely on the theory that the Center unilaterally changed the way it hired full-time bargaining unit employees, from scheduling new-hires at 40 hours per week to scheduling them at 37.5 hours per week. (Tr. 9). CGC then introduced GC Exh. 9 into evidence in support of this theory, but provided no testimony. Despite that singular focus in its opening statement and despite never articulating any other theory of liability at the hearing, CGC withdrew and abandoned this theory of liability after the hearing. CGC informed Respondent's Counsel of such via telephone on August 3, 2018. This understanding was confirmed via email between Counsel shortly thereafter. Therefore, Respondent does not address this theory of liability herein. In addition, Respondent is withdrawing its 10(b) affirmative defense, and does not address it herein.

did not call a witness to explain, in any way, what the Chart purports to demonstrate (including how the alleged change came to be) or in what way Respondent violated Section 8(a)(5) based on the Chart and the limited supporting evidence. Nor did CGC explain how the information in the Chart—where the Union alleges Respondent reduced the hours of the 20 employees at certain points in 2014 and 2015—related in any way to CGC's allegation that Respondent reduced bargaining unit employees' hours since about February 2013. Given the paucity of evidence and lack of an articulated legal theory, it is thus unclear exactly what CGC is alleging—whether CGC contends that Respondent reduced these employees' hours for only the limited number of payroll periods for which CGC presented evidence, or, possibly, that Respondent changed these employees' schedules for a larger period of their employment. There is simply no cogent case against Respondent.

Regardless of what theory CGC will advance, CGC did not meet its burden of proof on any theory that Respondent unlawfully reduced bargaining unit employees' hours. All CGC has done is "cherry-pick" payroll registers from a limited number of pay periods where 20 employees worked less than 40 hours per week, and, from that alone, argue that Respondent unlawfully reduced these employees' hours or schedules. At no point did CGC provide evidence that, either before or after the Union was certified, Respondent was obligated to ensure or guarantee that full-time employees were regularly scheduled for 40 hours per week or worked 40 hours in a week. In fact, the only testimony presented during the hearing, and the documentary evidence, unequivocally showed the opposite (which, as discussed above, led CGC to walk away from its primary theory of liability). Accordingly, even if CGC showed that these 20 employees may have worked less than 40 hours in a few weeks, it does not demonstrate that Respondent reduced these employees' hours or changed their schedules in violation of Section 8(a)(5). Moreover, to the

extent that CGC did meet its burden to demonstrate a Section 8(a)(5) violation, CGC only did so for the approximately five (5) or six (6) pay periods for which it submitted evidence.

CGC did not call ***any of the employees*** whose hours were at issue to testify as to the alleged change or enter into evidence any of the departmental schedules the Center produced to the Union in the course of bargaining pursuant to the Union's request. On the other hand, when the Center entered into evidence the schedules and the full payroll records for one of the employees at issue (Andrew Hegarty)—something it was not required to do in light of CGC's failure to present supporting evidence to meet its burden in its case in chief—the Center demonstrated how CGC's limited evidence, devoid of context, does not prove a reduction in hours or change in schedule.

In regards to the discipline allegations, the Center maintains that *Total Security,* for the reasons articulated by former Chairman Miscimarra in his dissent, should be overturned. Should *Total Security* be overturned, Respondent did not violate Section 8(a)(5), as the Union stipulated to the fact that it never requested bargaining over the discipline at issue, despite requesting bargaining over several other disciplines, and that the Center bargained with the Union when requested.

II. FACTS

A. Background

Respondent is a rehabilitation and nursing facility located in New Milford, New Jersey, with over 200 beds available for residents. (GC Exh. 4; Tr. 82). The highest ranking employee at the Center is the Administrator, who is licensed by the state of New Jersey to run a skilled nursing facility, such as the Center. (Tr. 56-57). The Administrator is responsible for the day-to-day operations of the Center and makes all decisions regarding resident care and the employees who work at the Center. (Id.)

On March 9, 2012, the Union won a representation election in Case 22-RC-073078 to represent a bargaining unit of the following job positions at the Center: Licensed Practical Nurses (LPN), Certified Nursing Assistants (CNA), Dietary Aides, Housekeepers, Laundry Aide, Porters, Recreation Aides, Restorative Aides, Rehabilitation Techs, Hospitality Aides, Central Supply Clerks, Unit Secretaries, Receptionists, Maintenance Workers, and Porters. (GC Exh. 1(d), (g); GC Exh. 2). In order to challenge the Board's decision overruling the Center's objections, the Center refused to recognize or bargain with the Union, prompting a charge from the Union in Case 22-CA-097938 on which the Board issued summary judgment. (GC Exh. 2(m) *reported at* 361 NLRB No. 117 (2014)).

Respondent appealed to the D.C. Circuit, but in light of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the appeal was delayed when the Board set aside its decisions in Cases 22-CA-097938 and 22-RC-073078. The Board reaffirmed these decisions on June 15, 2015 (GC Exh. 2(n) *reported at* 362 NLRB No. 114 (2015)), the Center again appealed to the D.C. Circuit on July 7, 2015, and the D.C. Circuit issued its decision upholding the Union's certification on January 24, 2017 (GC Exh. 2(o)). Following some preliminary discussions and Respondent producing a voluminous amount of requested information to the Union, the parties met for their first bargaining session on May 11, 2017. The instant case deals with actions allegedly taken by the Center during the period that it was challenging the Union's certification.

B. CGC's Case Regarding the Reduction in Hours Allegation

CGC's allegation in the Complaint regarding alleged reduction in hours merely state that "[s]ince about February of 2013, Respondent has unilaterally decreased bargaining-unit employees' hours" without "providing notice to the Union and without affording the Union an opportunity to bargain…." (Compl. ¶¶ 19-20). In its case in chief, as substantive evidence in

support of this allegation, CGC entered into evidence five (5) charts prepared by the Union. The first four (4) charts contained data regarding full-time new hires and their regularly scheduled hours, to which Respondent stipulated. (GC Exh. 9; *see also* R. Exh. 2). These charts related to CGC's theory of liability that Respondent changed its hiring practices to stop hiring full-time employees at 40 hour per week schedules and started hiring full-time employees only at 37.5 hour per week schedules, which CGC later withdrew and abandoned. The fifth chart (the Chart) listed 20 employees[4] and, per the Chart's title, alleged these were employees "[w]hose [h]ours [w]ere [d]ecreased." (GC Exh. 10(a)). Among other information, the Chart listed the pay period in 2014 or 2015 in which the 20 employees' hours were allegedly decreased, and the "standard hours" of the employees for each year of their employment, with their "standard hours" going from 40 to 37.5 (in one case, 38) in the year in which their hours were allegedly reduced. (Id.)

Respondent did not stipulate that these employees' hours were reduced as alleged in the Chart. (Tr. 18-19). However, CGC claimed the information in the Chart was supported by the limited number of payroll registers CGC also submitted into evidence, which consisted only of payroll registers from approximately five (5) or six (6) pay periods prior to the date the Chart demarcated these employees' hours were allegedly reduced, and approximately five (5) or six (6) pay periods after this date. (GC Exh. 10(b)-(h); Tr. 17-18). However, neither CGC nor the Union called any witnesses to explain the information in the Chart, such as how the payroll period where an employee's hours were allegedly decreased was determined, what the employee's "standard hours" meant, how the information in the Chart related to CGC's allegation in the Complaint that the reduction in hours occurred "[s]ince about February 2013," or how any information from the

[4] Which consisted of seven (7) Dietary Aides, three (3) Housekeepers, two (2) Laundry Aides, one Porter, one Maintenance Worker, five (5) Recreation Assistants, and one Receptionist. (GC Ex. 10(a)).

Chart for a time period unsupported by underlying payroll registers can possibly be determined. In fact, neither CGC nor the Union called any witnesses at all, despite the fact that many of the 20 employees at issue are still current employees, and one—Andrew Hegarty—is part of the Union's bargaining committee.

C. Respondent's Case Regarding the Reduction in Hours Allegation

1. Background on Respondent's Witness, Maureen Montegari

For its case, Respondent called Maureen Montegari (Montegari), currently the Vice President of Human Resources for Care One Management, LLC. (Tr. 21-22). In January 2010, Montegari began as a Regional Director of Human Resources. (Tr. 20-21). In this role, Montegari reported to the Vice President of Human Resources and provided day-to-day human resources services to a region of nursing facilities, which included the Center. (Tr. 21-22). In 2012, Montegari was promoted to her current role as Vice President of Human Resources, where she now supervises the Regional Directors of Human Resources, including the Regional Director of Human Resources covering the Center. (Tr. 22-23). In her role as both Regional Director of Human Resources and Vice President of Human Resources, Montegari was familiar with the Center's payroll, scheduling, and hiring polices, and the Center's operational needs as it relates to human resources. (Tr. 23). As both the individual responsible for day-to-day human resources for the Center, and then as the individual supervising the Regional Director responsible for day-to-day human resources for the Center, it was Montegari's responsibility to be familiar with all aspects of the Center's human resources and human resources polices. (Id.)

Montegari has a comprehensive understanding of the Center's scheduling policies, as well as the staffing and scheduling at the Center through her interaction with the Center's management team and her observations of and knowledge of the Center. (Tr. 64-65, 73-74, 86-87). In addition,

as Vice President of Human Resources, Montegari has been responsible for approving and/or updating human resources policies, such as policies governing payroll, scheduling, and hiring policies.[5] (Tr. 89-90).

2. The Center's Wage & Benefit Summary and Scheduling Policy

Montegari testified that every new hire receives a copy of the Center's Wage & Benefit Summary at the beginning of their employment, and each employee is supposed to sign the Wage & Benefit Summary acknowledging receipt of it. (R. Exh. 1; Tr. 25). The Wage & Benefit Summary contains information on wages, work hours, paid sick and vacation time, health insurance, retirement benefits, and leave benefits, among other information, for the Center's employees. (R. Exh. 1). Montegari testified that the Wage & Benefit Summary entered into evidence as R. Exh. 1 went into effect on May 1, 2009 (the 2009 Wage & Benefit Summary), replacing a previous version.[6] (R. Exh. 1; Tr. 25, 65-66). The 2009 Wage & Benefit Summary

[5] During cross examination, the Union's counsel seemed to try to demonstrate that Montegari, as Vice President of Human Resources, was too far removed from the individual centers and employees she supported to have knowledge of scheduling practices at the Center. (Tr. 81-83). However, Montegari credibly testified that she has always had knowledge of payroll, scheduling, and hiring policies at the Center (including knowledge of the 2009 Wage & Benefit Summary and Master Schedules, which will be discussed below), and, moreover, as Vice President of Human Resources, she has been the individual responsible for approving or updating these policies. Indeed, as Montegari unequivocally testified, "It's [her] job to be familiar with the scheduling and the HR operations of the facility." (Tr. 29). On the other hand, CCG presented no testimony disputing Montegari's claims or that would impeach her credibility. Moreover, by withdrawing its theory that Respondent's hiring practices constituted a unilateral reduction of hours in violation of Section 8(a)(5) after reviewing Montegari's testimony, CGC has implicitly acknowledged that Montegari was a credible witness who testified based on personal knowledge.

[6] Montegari testified that the substantive change regarding hours worked and scheduling that went into effect in May 2009 with the 2009 Wage & Benefit Summary involved a shift by the Center from predominantly hiring Full-Time employees at a regular schedule of 40 hours per week to predominantly hiring Full-Time employees at a regular schedule of 37.5 hours per week. (R. Exh. 2; Tr. 31). Certain job positions, such as Registered Nurse (which is not in the bargaining unit) and LPN, continued to be hired to regularly work 40 hours per week, and the Administrator had the discretion to make exceptions based on the needs of the Center to regularly schedule other bargaining unit employees for greater than 37.5 hours per week. (Tr. 28-29, 42-45). Although Montegari did not begin supporting the Center until 2010, she testified she was aware of the

remains substantively in effect, except for minor formatting changes and changes to update the document to comply with the law. (Tr. 25-26).

Per the 2009 Wage & Benefit Summary, the Center has four (4) categories of employees, which are based on the hours they regularly work: (1) Full-Time employees; (2) Part-Time Benefits Eligible employees; (3) Part-Time Not Benefits Eligible employees; and (4) Per Diem employees. (R. Exh. 1 p. 2; Tr. 26). Full-Time employees "[r]egularly work[ ]37.5 hours or more per week," Part-Time Benefits Eligible employees "[r]egularly work[]24 hours to less than 37.5 hours per week" (and are eligible for pro-rated benefits – i.e. vacation, sick time, health and retirement benefits), and Part-Time Not Benefits Eligible employees "[r]egularly work[ ]less than 24 hours per week." (R. Exh. 1 p. 2*).* Per Diem employees are hired on an as needed basis to fill in uncovered shifts, such as to cover vacations or recently vacated positions. (R. Exh. 1 p. 2; Tr. 26-27). It is the Administrator's decision whether to hire a Full-Time, Part-Time (either Benefits Eligible or Not Benefits Eligible), or Per Diem employee, which is based on the needs of the Center and the number of hours it would need that employee to work. (Tr. 26).

Nothing about the 2009 Wage & Benefit Summary regarding hours worked or scheduling changed after May 1, 2009, or after the Union's certification in March 2012. (Tr. 30-31). Accordingly, the terms of the 2009 Wage & Benefit Summary represented the status quo prior to the Union's certification that the Center was required to maintain after the Union's certification. Notably, the 2009 Wage & Benefit Summary does not set a minimum number of hours an employee will work, let alone guarantee that employees will always work a minimum number of hours in a given week. Rather, it only provides that employees ***regularly*** work a certain number

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Center's pre-May 1, 2009 policy based on the fact that, as she began working with the Center, her job was to become intimately familiar with the Center and its previous payroll and scheduling practices. (Tr. 31).

of hours based on their category. (R. Exh. 1; Tr. 47-50, 66-67). For instance, the 2009 Wage & Benefit Summary describes how the Center will conduct audits to ensure that an employee's actual hours worked are in line with their status, and it makes clear that an employee's status will be adjusted to match their hours worked, and not that an employee will be guaranteed a certain number of hours within or to match their category. (R. Exh. 1 p. 2).

Moreover, Montegari testified that although an employee's schedule should drive the actual hours employees work, employees could work more or less than their scheduled hours. (Tr. 47-50, 66-67, 72-76). Similarly, because payroll registers show the hours an employee actually worked, payroll registers will not necessarily reflect what an employee was scheduled to work, and employees' actual hours as reflected on their payroll registers could be more or less than their original scheduled hours.[7] (Tr. 47-50, 66-67, 72-76). As Montegari's testimony clearly shows, the 2009 Wage & Benefit Summary—without a guarantee or minimum number of set hours—represented the status quo as of the Union's certification that Respondent was required to maintain.

3. The Payroll Registers and Master Schedules of Andrew Hegarty Demonstrate that he Regularly Worked and was Scheduled for 40 Hours Per Week Throughout his Employment

Respondent entered into evidence the payroll registers of Andrew Hegarty (Hegarty) for the entirety of his employment (R. Exh. 6), and the Maintenance Department Master Schedules from the week ending January 2, 2016 (when the Center began using the SmartLinks system, and thus the earliest date these schedules exist) through April 22, 2017 (the last week prior to when the schedules were pulled on April 24, 2017 in order to produce to the Union at the beginning of

[7] Respondent notes that even the payroll registers from the pay periods prior to when Respondent allegedly reduced the 20 employees' hours (as demarcated in the Chart) show a fluctuation in hours actually worked, which demonstrates that there was never a guarantee of a Full-Time employee working 40 hours per week. (GC Exh. 10(b)-(h)).

bargaining)[8] (R. Exh. 3; Tr. 46-48, 88-92). This evidence demonstrates that Hegarty's hours worked and schedule regularly stayed at 40 hours per week throughout his employment. Hegarty only worked less than 40 hours in a week in random, haphazard weeks, which is still consistent with the 2009 Wage & Benefit Summary. In addition, for the 69 weeks for which Respondent pulled the Master Schedule for Hegarty's department, Hegarty was scheduled for 40 hours per week for all but nine (9) weeks (87%).[9] In contrast to CGC's failure to provide testimony or evidence regarding Hegarty's schedule, Montegari, upon reviewing the Master Schedule and based on her experience, confirmed that Hegarty's schedule reflected an individual who was regularly scheduled for 40 hours per week.[10] (Tr. 50-51).

4. Any Reduction in Dawn-Marie Sormani's Hours or Change in her Schedule Was Taken in Conjunction with a Position Change

The evidence presented shows that any reduction in the hours or change in the schedule of Dawn-Marie Sormani (Sormani) appears to have occurred in conjunction with a position change from Unit Secretary to Receptionist. As Montegari testified (and which went unrebutted by CGC), the Receptionist position, consistent with the Center's 2009 Wage & Benefit Summary that went into effect on May 1, 2009, would have been regularly scheduled at 37.5 hours per week. (Tr. 44-

[8] Montegari also testified that she pulled the Master Schedules for other departments besides the Maintenance Department, which were provided to the Union in the course of bargaining. (Tr. 88-92).

[9] Respondent counted days where Hegarty took vacation or called out, as indicated on the schedule, for the purposes of determining whether Hegarty was scheduled for 40 hours. Hegarty was not scheduled for any hours for the week ending June 18, 2016.

[10] The Union's counsel cross-examined Montegari on her knowledge of Hegarty's schedule, in an effort to impeach her credibility on this testimony. (Tr. 72-77). However, while Montegari admittedly is not directly involved in scheduling Hegarty or any other employee at the Center, Montegari credibly testified that she is familiar with the Master Schedules and the SmartLinks software used to create them in her position as Vice President of Human Resources. Consequently, she was fully capable of reviewing a Master Schedule and explaining her understanding of it based on her personal knowledge and experience in human resources supporting the Center. (Tr. 64-65, 73-74, 86-87).

46). Indeed, the other Receptionist hired, Iren Helen Dobridge, was hired at a regular schedule of 37.5 hour per week, as well. (R. Exh. 2). Despite objecting at the hearing when Montegari testified that Sormani appeared to change positions in conjunction with the alleged reduction in hours (Tr. 44-46), based on CGC's Exhibit 10(a), it does not seem that CGC and the Union actually dispute that the alleged reduction in hours came in conjunction with a position change.[11]

D. The Parties Have Stipulated to the Relevant Facts Surrounding the Discipline Allegations in Paragraphs 21 through 25 of the Complaint

The parties stipulated to the facts surrounding the discipline referenced in Paragraphs 21 through 25 of the Complaint, as relevant to determining whether Respondent violated Section 8(a)(5).[12] (*See* Compl. ¶¶ 21-25). The Center did not provide the Union with notice or an opportunity to bargain prior to issuing the discipline at issue (suspensions occurring on October 10, 2016, February 1, 2017, and March 23, 2017 to three (3) different employees, and a termination of another employee on January 4, 2017). (Id.; GC Exh. 4 ¶ 1). On June 2, 2017, the Center notified the Union of this discipline in the course of bargaining with the Union. (GC Exh. 4 ¶ 2). However, the Union has never requested bargaining over this discipline, despite the fact that: (1) all of the discipline at issue were relatively recent (as little as three (3) months prior to the Center and Union beginning bargaining, and, at most, eight (8) months prior); (2) the Union has requested bargaining over multiple disciplines that took place after May 1, 2017; and (3) the Center has engaged in such bargaining when requested. (Id. ¶ 3, 5).

[11] Moreover, Respondent notes that Sormani's "Dept" code in her payroll registers changed from 303721 to 303702 in the payroll period ending May 9, 2015, which would indicate a change in department from the Nursing Department (which included the Unit Secretary position) to the Administration Department (which included the Receptionist position).

[12] Prior to the hearing, CGC confirmed for Respondent that any evidence as to whether the referenced discipline was taken for cause would be reserved for the compliance stage of the proceeding, if necessary. The parties memorialized this understanding in the stipulation. (GC Exh. 4 ¶ 6). Respondent maintains that it took all discipline referenced in the Complaint for cause.

III. ARGUMENT

A. Legal Standard

It is axiomatic, as established by the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962), that an employer violates Section 8(a)(5) by making a unilateral change to bargaining unit terms and conditions of employment without first providing notice and the opportunity to bargain with the Union. See *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. (2017). However, a necessary component to such a violation is that the "employer has *changed* the existing conditions of employment." Id. at *10 (quoting *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994)) (emphasis in original). It is CGC's burden to prove that Respondent made a change to the existing conditions of employment. See *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618 (2007) (to establish Section 8(a)(5) violation for unlawful unilateral change, "the General Counsel must first demonstrate that the polices constituted a substantial and material change in terms and conditions of employment"); *Pacific Diesel Parts Company*, 203 NLRB 820, 824 (1973) (concluding that "General Counsel has failed to sustain the burden of proof in establishing…a violation of Section 8(a)(5) and (1) of the Act," because General Counsel failed to show an unlawful change to the terms and conditions of employment); *Miller Waste Mills, Inc.*, Case No. 18-CA-16411, 2003 WL 22135398 (NLRB Div. Judges Sept. 11, 2013) ("Because counsel for the general counsel has not established any change that is inconsistent with the expired agreement's terms, the burden of proof as to a Section 8(a)(5) violation has not been met.").

In order to meet its burden of proof, CGC must initially establish a prima facie case by sufficient evidence to demonstrate a Section 8(a)(5) violation, after which the burden shifts to Respondent to rebut CGC's case. See *Fresno Bee*, 339 NLRB 1214, 1214 (2003) ("The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer

made a material and substantial change in a term of employment without negotiating with the union."); *Superior Container, Inc.*, 276 NLRB 532, 534-37 (1985) (finding no 8(a)(5) violation where record was devoid of evidence of several elements needed to set forth a prima facie case, including evidence that "any of the alleged unilateral conduct actually occurred"); see also *Nat'l Automobile and Casualty Insurance Co.*, 199 NLRB 91 (1972) (finding a Section 8(a)(5) violation only where CGC established by sufficient, competent, and credible evidence a prima facie violation).

B. CGC Did Not Meet Its Burden To Demonstrate That Respondent Reduced the Hours of the 20 Employees Listed in the Chart

1. CGC Has Not Articulated a Theory of Liability

Throughout this case, CGC has kept its allegation regarding Respondent's alleged reduction in bargaining unit employees' hours as vague as possible.[13] CGC's allegation in the Complaint regarding reducing bargaining unit employees' hours merely states that "[s]ince about February of 2013, Respondent has unilaterally decreased bargaining-unit employees' hours" without "providing notice to the Union and without affording the Union an opportunity to bargain…." (Compl. ¶¶ 19-20). In its opening statement at the hearing, CGC solely focused on the legal theory—later withdrawn and abandoned—that Respondent "reduced the hours of the bargaining unit employees and began hiring employees at only 37 and half hours." (Tr. 9). CGC articulated ***no other theory*** during the hearing as to a potential violation regarding Respondent's alleged reduction of bargaining unit employees' hours.

[13] This vague allegation may be an effort to allow CGC to retain maximum flexibility to shoehorn whatever legal theory it could come up with to fit the minimal evidence entered into the record, and to keep Respondent guessing as to how to mount an appropriate defense. In fact, Respondent notes that CGC informed Respondent and the ALJ during the parties' conference call ***the day before the hearing*** that CGC was still determining whether to add new allegations to the Complaint. The ALJ informed CGC that if it were to add new allegations, the hearing would be postponed, and CGC ultimately decided not to pursue any additional allegations in the Complaint.

Regarding the 20 employees on the Chart whose hours Respondent allegedly reduced, as discussed in Section II.B, supra, CGC simply entered the Chart and limited payroll records into evidence without further explanation. Moreover, CGC never articulated how the Chart—which alleges Respondent reduced the hours of the 20 employees at certain points in 2014 and 2015—related in any way to CGC's allegation that Respondent reduced bargaining unit employees' hours since about February 2013. The limited evidence CGC did submit is thus completely divorced from the actual allegation in the Complaint. Respondent is simply left guessing as to what exactly CGC is alleging this limited evidence shows. On the one hand, it is possible that CGC is alleging that Respondent violated Section 8(a)(5) by reducing the ***hours*** of these 20 employees from 40 hours to less than 40 hours for the limited weeks for which CGC entered payroll registers into evidence. On the other hand, it is possible that CGC is alleging that Respondent reduced the ***schedules*** of these 20 employees from 40 hours to 37.5 hours per week beyond just the weeks for which CGC entered payroll registers into evidence. Regardless, CGC has not met its burden on either of these potential legal theories.

2. CGC Has Failed to Establish a Prima Facie Case Because It is not a Section 8(a)(5) Violation for Full-Time Employees Regularly Scheduled for 40 Hours Per Week to Work Less than 40 Hours

a. *Respondent never guaranteed Full-Time employees a certain number of hours*

Per the 2009 Wage & Benefit Summary and corroborating testimony of Montegari, it is uncontested that the status quo as of March 2012 when the Union was certified as the employees' bargaining representative was that Full-Time employees would ***regularly work*** 37.5 hours or more per week, and the 20 employees at issue regularly worked 40 hours per week. The 2009 Wage & Benefit Summary, which went into effect in May 2009, never set a minimum number of hours an employee would work or guaranteed that an employee would always work a minimum number of

hours in a given week, and Montegari testified that the status quo was that employees could work more or less than their regularly scheduled hours. (R. Exh. 1; Tr. 47-50, 66-67, 72-76). Therefore, to the extent the limited payroll registers submitted into evidence by CGC show the 20 employees at issue working less than 40 hours in certain weeks, those hours do not represent a reduction that would qualify as a "change" in the status quo violating Section 8(a)(5). Instead, it is just a manifestation of the status quo where employees' actual hours worked fluctuated below and above their regular hours. See *Superior Container, Inc.*, 276 NLRB at 534-35 (no Section 8(a)(5) violation for alleged change in policy where policy was in effect prior to union's certification, policy allowed for "flexibility in implementation," and policy was, at all times, implemented in accord with its terms). CGC and the Union presented no evidence to the contrary.

b. *At most, CGC demonstrated a violation for the limited number of weeks for which it entered payroll registers into evidence*

To the extent Respondent allegedly violated Section 8(a)(5) any time the weekly hours of a Full-Time employee regularly scheduled for 40 hours in a week fell below 40 (which is not the case), CGC only demonstrated any violation for the limited number of pay periods for which it entered payroll registers into evidence. It would be improper to assume that any of the 20 employees at issue worked less than 40 hours in any week other than the weeks for which CGC submitted direct evidence, and it is not the ALJ or the Respondent's job to fill in the evidentiary gaps CGC has left in its case in chief. See *Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995) (overturning ALJ's determination of joint employer status where the "record in this case is devoid of any direct evidence that [alleged joint employer] meaningfully affected" terms and conditions of employment, and ALJ erred in filling the gap in CGC's case with an adverse inference against the employer). Therefore, even if CGC met its burden on this potential theory of liability (which it did not), it only met its burden for the few pay periods for which it provided

direct evidence of a violation—not any pay periods for which the ALJ would have to assume a violation.

3. CGC Has Failed to Establish a Prima Facie Case Because CGC Did Not Prove that Respondent Changed the 20 Employees' Schedules

To the extent CGC's theory of liability is that Respondent allegedly changed the schedules of the 20 employees in the Chart from 40 to 37.5 hours per week in violation of Section 8(a)(5), CGC failed to meet its prima facie burden by only submitting into the record "cherry-picked" payroll registers devoid of any context. As discussed throughout, Respondent's policy as established in its 2009 Wage & Benefit Summary that went into effect on May 1, 2009, provided no minimum number of hours an employee would work or guarantee that an employee would work at least his or her scheduled hours—it only provided an employee with a ***regular*** schedule, from which the employee's actual hours worked could fluctuate. (R. Exh. 1; Tr. 47-50, 66-67, 72-76).

In addition, the payroll registers submitted by CGC show that the hours of the 20 employees in the Chart fluctuated both before and after the pay period demarcated as the date the employees' schedules allegedly "changed." (GC Exh. 10(b)-(h)). In several instances prior to the Chart's demarcated pay period, the 20 employees worked less than 40 hours, and in several instances after the demarcated pay period, the 20 employees worked more than 37.5 hours. It is thus impossible to determine, from the payroll registers alone, that Respondent changed these 20 employees' schedules. Therefore, simply submitting payroll registers from a few pay periods where the 20 employees worked less than 40 hours does not meet CGC's burden of proof to demonstrate that Respondent unilaterally changed these employees' schedules.

Tellingly, CGC submitted no testimony from ***any of the 20*** employees as to their schedules (despite many being current employees and thus easily accessible to the Union, and one—Hegarty— being part of the Union's bargaining committee). CGC thus provided no direct evidence

that the hours in the payroll registers on which it relies were the result of Respondent's decision to change schedules, rather than any number of potential reasons why these employee would have worked less than 40 hours in those weeks (e.g., at their own request to accommodate another job or a medical issue, or because the employee requested to leave work early, etc.). In addition, the Union had in its possession the Master Schedules from other departments (Tr. 88-92), and CGC could have entered those schedules into evidence (as Respondent did with Hegarty's Master Schedule) in support of its case in chief to provide direct evidence of employees' schedules. CGC's failure to enter into evidence actual schedules to support a theory that Respondent allegedly unilaterally changed schedules is a striking failure.

Instead, CGC wants the ALJ to simply presume an unfair labor practice occurred here, without actually demonstrating that one occurred. The Board has held such a presumption is insufficient, and that it will not fill in CGC's case—or require Respondent to fill in CGC's case—where CGC fails to submit the evidence required to prove an unfair labor practice occurred. See *Riverdale Nursing Home*, above at 881-82 (overturning ALJ's determination of joint employer status where the "record in this case is devoid of any direct evidence that [alleged joint employer] meaningfully affected" terms and conditions of employment, and ALJ erred in filling the gap in CGC's case with an adverse inference against the employer); *Ohmite Manufacturing Company*, 290 NLRB 1036, 1038 (1988) ("Only when the General Counsel has presented prima facie evidence of [a violation] will the burden shift to the employer to either discredit the General Counsel's evidence or…."). Again, it is not the job of the ALJ or Respondent to prove CGC's case for it, and CGC has not met its burden in this case where it has left such large gaps beyond the limited payroll registers for the "cherry-picked" payroll periods it submitted into evidence for the ALJ to fill in.

In fact, in similar Section 8(a)(5) cases where CGC did not present sufficient record evidence of a unilateral change in terms and conditions of employment, the Board has dismissed Section 8(a)(5) allegations. For example, in *Superior Container, Inc.*, 276 NLRB at 534-37, the Board dismissed allegations that the employer made unilateral changes to its absentee-discipline policy, the method for calculating bonuses, and its mandatory overtime policy after the union was allegedly certified and before a first contract was reached. Concerning the alleged change in the absentee-discipline policy, the Board found that the policy was in effect both before and after the union's alleged certification, and that the employer lawfully applied the policy "in substantial accord" with the policy's terms both before and after the union's certification, even if that necessarily resulted in certain variations based on the flexibility of the policy. *Id.* at 534-35. Regarding the alleged change in bonus calculations, the Board found that the record was "devoid of evidence" that there was an actual change in the method of calculating bonuses, and faulted CGC for failing to procure evidence that would explain why two (2) individual employees did not receive bonuses—whether for a lawful or unlawful reason. *Id.* at 535. The Board thus held that to find an unfair labor practice on this allegation would be impermissibly "speculative." *Id.* As for the alleged change in mandatory overtime policy, the Board found that "[n]o direct evidence was presented" to demonstrate that the employer actually changed its policy. *Id.* at 536.

Similarly, in the instant case, Ms. Montegari's testimony (which went uncontroverted) and the plain language of the 2009 Wage & Benefit Summary demonstrate that the Center's policy has been that Full-Time employees regularly work 37.5 or more hours per week, that this policy was the status quo as of the Union's certification, and that the Center maintained—and still maintains—this policy after the Union's certification. (R. Exh. 1; Tr. 25, 30-31, 47-50, 65-67). As the Board found in *Superior Container*, CGC did not demonstrate in the instant case that the Center deviated

from this policy in scheduling the 20 employees at issue based on the limited payroll registers it entered into the record. Also similar to *Superior Container*, CGC presented no direct evidence in the instant case that the 20 employees' schedules were changed, instead relying on limited payroll registers that would render a violation based on alleged changes in schedule impermissibly "speculative."[14] Lastly, as in *Superior Container*, CGC did not procure any evidence—despite having the ability to call the employees at issue to give testimony or enter other documentary evidence into the record—that would actually explain the violation that CGC alleges occurred. Ultimately, the Board has been clear that CGC must meet its burden of demonstrating an actual change in terms and conditions of employment, and has not accepted CGC's past invitations to assume or speculate that such a change has occurred. Respondent respectfully requests that the ALJ follow this precedent.

C. To the Extent CGC Set Forth a Prima Facie Case, Which it Did Not, Respondent Successfully Rebutted CGC's Case

Even if CGC set forth a prima facie case that the Center actually changed the hours or schedules of the 20 employees at issue (which CGC did not), Respondent successfully rebutted CGC's case by either demonstrating that any change that occurred would be in keeping with the status quo, or, in the case of Hegarty, affirmatively demonstrating that CGC's evidence was "cherry picked" and that he regularly worked and was regularly scheduled at 40 hours per week for the entirety of his employment.

[14] See also *Ferguson Enterprises, Inc.*, 349 NLRB at 618 (finding no Section 8(a)(5) violation for change in cell phone policy because there was "no specific evidence" that employees' terms and conditions of employment were actually changed).

1. Respondent Would Not Violate Section 8(a)(5) by Changing Sormani's Hours or Schedule to Match a New Job Position

Even if Sormani's hours or schedule were reduced or changed, which CGC did not demonstrate, CGC appears to allege that such reduction in scheduled hours occurred in conjunction with a change in position to Receptionist, for which it was Respondent's practice to regularly schedule at 37.5 hours per week. As Montegari testified, and as corroborated by the fact that the only other Receptionist hired—Iren Helen Dobridge—was hired at 37.5 hours per week in January 2010 (R. Exh. 2; Tr. 44-46), the Receptionist position had been regularly scheduled at 37.5 hours per week prior to March 2012. Therefore, in such circumstances, Respondent did not unilaterally "change" Sormani's hours in a manner that results in a Section 8(a)(5) violation. To the contrary, Respondent maintained the status quo since Receptionists were hired at 37.5 hours per week prior to the Union's certification in March 2012, and, when Sormani transferred to that position, she likewise took on the terms and conditions of employment of a Receptionist as had been set prior to March 2012. Any argument by CGC otherwise would lead to an absurd result, in that Respondent would violate the Act any time an employee switched positions and had their job duties, pay rate, or hours "changed" to match those for the position to which they switched (and which had been set prior to the Union's certification).

2. Respondent Affirmatively Demonstrated that Hegarty Regularly Worked and was Regularly Scheduled at 40 Hours or More Per Week Throughout His Employment

The full complement of Hegarty's payroll registers and the 69 weeks of Master Schedules Respondent submitted into evidence in its case affirmatively demonstrate that Hegarty was regularly scheduled at, and regularly worked, 40 hours or more per week.[15] Indeed, except for

[15] Respondent notes, however, that the decision to submit additional payroll registers for Hegarty and Hegarty's Master Schedules should, in no way, constitute an acknowledgment that CGC met its prima facie burden as to Hegarty or any of the 20 employees in the Chart. The fact

several random, haphazard weeks, Hegarty worked 40 hours or more per week throughout his tenure. In fact, for all but nine (9) of the 69 weeks for which Respondent submitted Hegarty's Master Schedule, Hegarty was scheduled for 40 hours. (R. Exh. 3, 6). Accordingly, even if CGC met its burden to set forth a prima facie case as to Hegarty (which it did not), Respondent successfully rebutted it.[16]

3. Even if CGC Proved that Respondent Changed the 18 Other Employees' Hours or Schedules (Which CGC Did Not), Such Change Would Not Violate Section 8(a)(5)

Even if CGC demonstrated that the Center reduced the hours or changed the schedules of the other 18 employees in the Chart (which CGC did not do), Respondent did not violate Section 8(a)(5) because any such change would have been in keeping with the Center's 2009 Wage & Benefit Summary, which went into effect on May 1, 2009, well before the Union's certification.[17] (Tr. 51). Therefore, any adjustment merely represented the Center lawfully maintaining the status quo. See *United States Postal Service*, 261 NLRB 505, 507 (1982) (employer did not violate Section 8(a)(5) by not granting discretionary increases and not informing the union because the

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that CGC did not meet its burden in its case in chief rendered Respondent's evidence unnecessary. See *Ohmite*, above at 1038 ("Only when the General Counsel has presented prima facie evidence [of a violation] will the burden shift to the employer…."). Still, Respondent submitted additional evidence regarding Hegarty out of an abundance of caution. Respondent notes that CGC and/or the Union had access to the same documents Respondent entered into evidence for the rest of the employees, and could have entered that into evidence in its case if it wished.

[16] Hegarty's payroll registers and Master Schedules demonstrate exactly why it would be inappropriate for the ALJ to extrapolate or infer anything about the 20 employees' hours worked or schedules beyond the payroll periods for which CGC submitted payroll registers. Snapshots and snippets from a few weeks of an employee's tenure do not provide the full context of an employee's hours worked or schedule. As Respondent demonstrated with Hegarty, simply because an employee's hours fluctuated to below 40 in a certain week, does not mean that the employee would not work or be scheduled for more hours in subsequent weeks. Indeed, there could be myriad reasons why an employee would work less hours in a certain week than it did in subsequent weeks, such as requesting to leave early, a medical accommodation, or requesting additional, unpaid leave, among other potential reasons.

[17] Although Respondent addressed arguments for Sormani and Hegarty, individually, in Sections III.C.1 and 2, supra, Respondent notes that this argument applies equally to them, as well.

cessation of discretionary increases did not result in any "proposed actions or policy changes"). CGC alleges that the "standard hours" of the employees in its Chart were reduced from 40 to 37.5 hours per week (in one case, 38), but the status quo for Full-Time employees as set forth in the 2009 Wage & Benefit Summary was only that Full-Time employees would "[r]egularly work[ ]37.5 hours or more per week…." (R. Exh. 1 p. 2). CGC's allegation, on its face, is thus clearly keeping in line with the status quo of Full-Time employees regularly working 37.5 or more hours per week, and neither CGC nor the Union provided any evidence (testimony or documents) to show that this conduct was not in accordance with the status quo, and, therefore, a violation of Section 8(a)(5).

Moreover, as Montegari testified, the Center's Administrator had the discretion to implement the 2009 Wage & Benefit Summary in order to meet the needs of the Center, both before and after the Union's certification. (R. Exh. 1; Tr. 25-29). This would include the decision to hire Part-Time or Per Diem employees instead of Full-Time employees. (Tr. 26). Therefore, as CGC would have it, if in the Administrator's discretion, less hours were needed from the positions held by the employees at issue, the Center could have lawfully switched these employees from Full-Time to Part-Time (either Benefits Eligible or Not Benefits Eligible) or Per Diem, because that would not have been a "change" to the Full-Time category. To take this one step further, the Center could have terminated these 20 employees and hired new employees at 37.5 hour per week schedules. But, according to CGC, the Administrator could not exercise his or her discretion—which was the status quo both before and after the Union's certification—to change these employees' schedules to meet the business needs of the Center. Again, this argument is illogical.

D. *Total Security* Should be Overturned

Although Respondent admittedly did not provide notice or bargain with the Union over the disciplines referenced in Paragraphs 21 through 25 of the Complaint, these allegations should be dismissed because they are premised on the Board's flawed decision in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. (2016). For the reasons articulated by former Chairman Miscimarra in his dissent in *Total Security*, (see supra at 17-41), absent a contract, employers should not be required to provide a union notice or an opportunity to bargain before imposing discretionary discipline on employees.

Moreover, to the extent *Total Security* is not good law, the Union admitted that it never requested bargaining over this discipline after the Center imposed it, despite the fact that the all of the discipline at issue was relatively recent (as little as three (3) months prior, and, at most, eight (8) months prior to the Center and Union beginning bargaining), and despite the fact that the Union requested bargaining over multiple disciplinary actions that took place after May 1, 2017 and the Center has engaged in such bargaining when requested. (Id. ¶ 3, 5). Under pre-*Total Security* Board law (see *Fresno Bee*, 337 NLRB 1161 (2002)), the Union's failure to request bargaining precludes a finding of a Section 8(a)(5) violation. See *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 1 fn. 3 (2018) (for discipline occurring prior to *Total Security* decision, no Section 8(a)(5) violation found because "Union did not request such bargaining"). Lastly, to the extent a remedy exists, it should not include a make whole remedy, such as back pay and reinstatement, because the employees were disciplined/discharged for cause.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Complaint be dismissed, and the ALJ grant all other just and proper relief.

Respectfully submitted,

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August 14, 2018

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

800 RIVER ROAD OPERATING
COMPANY, LLC d/b/a CARE ONE AT
NEW MILFORD Case 22-CA-204545

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of August, 2018, Respondent 800 River Road Operating Company, LLC d/b/a Care One at New Milford's Post-Hearing Brief in the above-captioned case has been e-filed with the NLRB and has been served on the following by electronic mail:

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